United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1116

UNITED STATES OF AMERICA,

Appellee,

—against—

JAMES GIACALONE,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Appellant James Giacalone appeals from a judgment of conviction entered January 23, 1974, after a jury trial, in the United States District Court, Eastern District of New York (Hon. Albert Coffrin, U.S.D.J., District of Vermont), convicting appellant of conspiring to pass, utter, publish and possess quantities of counterfeit United States Federal Reserve Notes in violation of 18 U.S.C. § 371.

Appellant was tried on four counts of an indictment alleging three substantive counterfeiting offenses and the one conspiracy count on which he was convicted. The other six substantive counts in the ten-count indictment did not name appellant but involved six other defendants who pled guilty prior to trial. Appellant was acquitted by the jury on two of the substantive counts which alleged the possession and uttering respectively of 3,185 counterfeit ten dollar bills on October 8, 1971. The third substantive count, Count Five, was dismissed during trial on the government's

motion. Appellant was convicted on the conspiracy count and was sentenced to three years imprisonment. Appellant is free on bail pending this appeal.

Count Five alleged that on January 4, 1972, appellant passed, uttered and published approximately 1,000 counterfeit ten dollar bills in violation of Title 18, United States Code, Section 472. The dismissal of this count on the Government's motion during trial is the sole basis for appellant's contention of error on this appeal. Appellant's argument is essentially that the dismissal of count five deprived him of a fair trial because the facts surrounding the offense alleged in the dismissed count were related to the jury by the prosecutor in his opening statement, and further because the counterfeit notes relevant to that count were marked for identification though not admitted into evidence.

Statement of Facts

I.

The evidence adduced at appellant's trial showed that during the summer and fall of 1971 appellant participated with six other persons in printing approximately $800,000. in counterfeit ten dollar bills and in distributing in excess of $100,000. of those counterfeit bills (R. 388, 393).* The scope and operation of the counterfeiting conspiracy and the extent of appellant's participation in it was established through the testimony of Arturo Ruemmeley, an accomplice witness, who, though not a co-defendant with appellant in the instant indictment, had earlier pled guilty to a related counterfeiting charge in the Southern District of New York (R. 339, 340).

According to Ruemmeley, the counterfeiting scheme began in June of 1971 when appellant and an associate, John Catti, approached Ruemmeley and one Gustave Zurak with a proposal to enter into the counterfeiting business (R.

* Unless otherwise specified, parenthetical page references are to the record on appeal.

346, 355). A series of meetings ensued in Queens and at appellant's house in Brooklyn, during which it was agreed that Ruemmeley and Zurak would attempt to make contact with an engraver of counterfeit plates while appellant would look for a printer and a supplier of high quality paper (R. 357, 358, 361).

As a result of their efforts an engraver, Mike Arzoominian, was brought into the scheme by Ruemmeley and Zurak (R. 358), and a printer, Fred Szafram, and a supplier of paper, Julio Vale, were recruited by appellant (R. 363, 365, 368, 382).

By the end of August 1971, the actual printing was ready to begin (R. 386). A set of $10 counterfeit plates had been supplied by Arzoominian (R. 280). Vale had provided an ample quantity of paper (R. 382). Ruemmeley and appellant purchased a multilith printing machine for $1,800. at Bookbinders in lower Manhattan and installed the machine at a factory leased by appellant at Jefferson Street and Central Avenue in Brooklyn, where appellant had formerly operated a sewing machine business (R. 376-380).

One morning in late August 1971, appellant, Ruemmeley, and the printer, Szafram, met at appellant's factory to begin printing the counterfeit money (R. 386). Approximately $400,000. in counterfeit tens was printed by Szafram that day. Ruemmeley and appellant assisted by unpacking the paper and handing it to Szafram and by performing various other menial tasks (R. 387). The initial printing was of very poor quality and unmarketable due to certain defects in the plates (R. 388). However, Ruemmeley and Zurak were able to persuade Arzoominian to engrave a new set of plates that very night so that a second printing could begin the following morning—in time to meet pressing sales committments (R. 393). Using the

new plates Szafram printed another $400,000. in counterfeit tens during the next two days, again with the assistance of appellant and Ruemmeley (R. 393-395).

After the second printing, the counterfeit $400,000. in the form of uncut sheets, each bearing the impressions of four counterfeit $10 bills, was divided into thirds. Two thirds went to Ruemmeley and Zurak out of which share Arzoominian was to be paid, and one-third went to appellant from which Szafram and Vale were to be "taken care of" (R. 399-400).

During September of 1971, Ruemmeley and Zurak cut and sold approximately $55,000. of the counterfeit bills, while appellant sold at least $25,000. which had been cut and delivered to him by Ruemmeley (R. 398-401). Additionally, just prior to October 8, 1971, another $100,000. of the counterfeit bills, still in uncut form, was delivered by Ruemmeley to appellant who had told Ruemmeley that he had found someone to cut it (R. 402).

On the evening of October 8, 1971, Ruemmeley and Zurak met appellant in the vicinity of appellant's house which is located on Jefferson Street in Brooklyn, just one block south of appellant's factory (R. 403). Appellant at that time told Ruemmeley and Zurak that a sale of counterfeit notes by appellant and Julio Vale had earlier that evening been interrupted by law enforcement authorities and that he, appellant, had narrowly escaped arrest (R. 407).

A few days later, appellant introduced Ruemmeley to Philip Stein whom appellant had enlisted to aid in removing the multilith machine and unsaleable scrap sheets of counterfeit bills from appellant's factory (R. 411-415). The machine was moved by Stein and Ruemmeley to Fred Szafram's printing plant in lower Manhattan (R. 415), but appellant told Ruemmeley that instead of destroying the

unsaleable uncut sheets removed from the factory by Stein, appellant and Julio Vale had buried them in the back yard of Vale's house on DeKalb Avenue in Brooklyn (R. 417, 418).

II.

The accomplice testimony of Ruemmeley was corroborated in several respects by other independent evidence in the Government's case.

As to the October 8, 1971 incident, Special Agent Joseph Coppola of the Secret Service testified that on that date in the vicinity of Vale's house at 1289 DeKalb Avenue, Brooklyn, he negotiated in an undercover capacity with both Vale and appellant for the purchase of $30,000. in counterfeit $10 bills at a price of 23% of face value (R. 21, 28, 41, 46-48). Although Coppola did not know appellant's name when they negotiated, he was able to make an identification of him at trial (R. 41). He also had learned of appellant's identity by tracing the plate number of the car in which the negotiations took place. The car was registered to the appellant (R. 46, 456-7).

When the negotiations in appellant's car were completed, Agent Coppola told appellant that he would wait with Vale outside Vale's house while appellant went to an undisclosed location to get the counterfeit money (R. 47-48). Within approximately five minutes Vale left Coppola's presence and walked several doors north on DeKalb Avenue to the intersection of DeKalb and Myrtle Avenues where he obtained a white paper bag from a man generally fitting appellant's description (R. 49, 50, 51, 230, 23). Vale carried the white paper bag back down DeKalb Avenue and delivered it to Agent Coppola (R. 51, 54). After examining the contents of the bag, which was later determined to contain $31,850. in counterfeit $10.00 bills

(G. Exh. 2), Agent Coppola gave a prearranged signal which resulted in the arrest of Julio Vale by several surveillance agents who had been positioned in the immediate vicinity (R. 52).

The man who had delivered the counterfeit money to Vale was pursued by other surveillance agents but managed to escape (R. 232, 233). Due to bad lighting conditions at the intersection where the transfer to Vale took place, none of the surveillance agents were able to positively identify appellant as the escapee. It was established, however, that the man who gave Vale the bag generally fit appellant's description, and further that he was wearing a dark brown leather car coat identical to the one appellant had been wearing both when he negotiated with Agent Coppola and when he had been seen by a surveillance agent entering Vale's house earlier that day (R. 49, 50, 51, 191, 192, 197, 230, 231).

To further corroborate Ruemmeley's testimony, the Government introduced into evidence 93 uncut sheets of paper each bearing impressions of the fronts and backs of $92,440. in counterfeit $10.00 bills (G. Exh. 6, R. 276, 9). These uncut sheets had been dumped by Julio Vale on October 18, 1971, into a trash bin at the Price Knox Paper Company where Vale worked at that time and which was located directly across the street from Vale's house (R. 238, 252). The uncut sheets were turned over to the Secret Service by William Leitch, a co-worker of Vale's at Price Knox, who had assisted Vale in disposing of them. It was established at trial that several of those uncut counterfeit sheets bore appellant's fingerprints in ink resembling printer's ink (R. 306-408, 317, 330). Moreover, the counterfeit bills on those uncut sheets bore the same serial numbers and had identical defects and characteristics as those purchased by Agent Coppola ten days earlier (G. Exh. 2); thus the two separate batches of counterfeit bills had been printed by use of the same master negative (R. 448).

III.

As to Count Five of the indictment, also referred to as the Stein count", it alleged that on January 4, 1972, appellant passed, uttered and published approximately $10,000.00 in counterfeit $10.00 bills. The only references made by the prosecutor to that count in his opening statement were as follows:

> The third count of this indictment involving James Giacolone charges that on or about January 4th of 1972 the defendant James Giacolone passed, uttered and published approximately 1,000 forged, falsely made and counterfeit ten dollar bills. Again, uttering and publishing means sold or transferred to another person . . . (R. 7).
>
> As to the third count, the Government will prove that on January 6th and January 14th of 1972, Philip Stein sold approximately $5,000.00 in counterfeit ten dollar Federal Reserve Notes. We will establish that these notes were from the same source as the notes transferred on October 8th, that source being James Giacalone and his associates in the counterfeiting business . . . (R. 9).
>
> In this case we will also hear from another person who participated in the Conspiracy. He doesn't know as much about the operations as Art Romell (sic). He wasn't in it from the very beginning. He could describe to us how he acquired the $5,000.00 which he sold in January to undercover Agents, from this defendant, James Giacolone. He can describe to us various other tasks he performed to further this criminal Conspiracy (A. 16).

During the trial the sole reference to the "Stein count" occurred while Agent Coppola was still on the stand after he had described his October 8, 1971 purchase from Vale

and appellant. Coppola merely described the purchase from Philip Stein on January 14, 1972 of $4,000.00 in counterfeit $10.000 bills (R. 66-67). That $4,000.00 was marked for identification (G. Exhs. 3 and 3A for ID) and was identified by Coppola in the presence of the jury as being the "counterfeit notes which I purchased from Philip Stein on January 14, 1972" (R. 71, 72). The $4,000.00 was never admitted into evidence and was never passed among the jury (R. 70). Appellant's name was never mentioned in connection with the $4,000.00 other than the above reference in the prosecutor's opening statement. Nor was any reference made during the trial to another undercover purchase of $1,000.00 from Stein on January 6, 1972, although that purchase is also referred to in the quoted portion of the opening statement.

At a sidebar conference out of the hearing of the jury, while Coppola was still on the stand, the prosecutor expressed his intention to call Philip Stein as a witness to testify that he received the $4,000.00 he had sold to Coppola on January 14, 1972, from appellant. Later, at the close of the Government's case, the prosecutor indicated that he had changed his mind about calling Stein as a witness by stating, out of the hearing of the jury:

> Your Honor, I have pretty well decided not to call Philip Stein as a witness and not to offer the notes which are 3 in evidence (sic) (R. 452). . . I am making a judgment that I do not need to prolong the trial (R. 456).

During a subsequent colloquy, the prosecutor moved to dismiss the Stein count and proposed that the court change the jury to disregard any reference made to that count (R. 464, 465). Appellant's trial defense counsel agreed that the count should be dismissed but carefully perserved his objection to the failure to call Stein as a witness (R. 455, 464, 464(a). Defense counsel then re-

quested that the court make no reference to the dismissed count in its charge (R. 466). At the conclusion of the colloquy, Judge Coffrin stated that he would consider the matter and inform counsel the following morning as to how he proposed to handle it in his charge (R. 466).

On the following morning, outside the presence of the jury, the court stated its intention, despite appellant's repeated objection, to make reference to the dismissed count in its charge (R. 486, 487).

ARGUMENT

Appellant was not prejudiced by the Government's dismissal during trial of a count of the indictment.

Relying on Rule 48(a) of Federal Rules of Criminal Procedure, appellant initially argues that he was deprived of a fair trial when the Government dismissed, without his consent, a substantive count (Count Five) of the indictment during the trial and after evidence had been admitted on that count (citing *United States* v. *Boiardo,* 408 F.2d 112 (3rd Cir. 1969). Essentially, it is appellant's position that under Rule 48(a) the Government may never dismiss a count in an indictment *during* trial without the defendant's permission. Such a construction of Rule 48(a) is entirely without precedent and is clearly erroneous.

In *United States* v. *Boiardo,* relied upon by appellant, the court merely held that under Rule 48(a) the prosecution may, *before* trial and without the defendant's consent, dismiss a count in an indictment without prejudice to subsequent prosecution. Dismissal of a count without the defendant's consent *during* trial, however, would implicitly result in a double jeopardy bar to any further action. Appellant's contention, that the in-trial dismissal of Count Five without his consent would, in addition to barring any sub-

sequent prosecution on that count, prejudice the remaining counts, is baseless. "The purpose of Rule 48(a) . . . is to protect a defendant from harassment by the Government through charging, dismissing and re-charging without placing a defendant in jeopardy. *Woodring* v. *United States*, 311 F.2d 417, 418 (8th Cir. 1963). As the *Woodring* court stated in rejecting the same argument appellant makes here: "[i]n any event, there could not possibly be prejudice to the defendant unless he was subsequently reindicted for the same charge . . ." *id.*

Appellant's further suggestion, that he was prejudiced by the failure of the prosecutor to call a witness whose testimony had been outlined in the Government's opening statement, is also without merit. *Frazier* v. *Culp*, 394 U.S. 731 (1969).

In *Frazier*, a similar argument was made. There, the prosecution went so far as to summarize in its opening statement anticipated testimony which was never, in fact, adduced during trial since the proposed witness—an accomplice—took the stand but refused to testify, invoking his Fifth Amendment privilege. Frazier argued that he was prejudiced since the jury might have accepted the prosecutor's opening-statement summary as the equivalent of testimony. Citing the trial court's limiting instruction that the jury must not regard statements of counsel as evidence, the Court rejected the argument, Mr. Justice Marshall writing for the Court. While prejudicial remarks made during an opening statement might result in reversible error, the Court concluded that the mere inclusion of an objective summary of evidence which the prosecutor reasonably expected to produce but which for some reason was not produced, is not per se error.

> "Certainly not every variance between the advance description and the actual presentation constitutes reversible error, when a proper limiting instruction has been given. Even if it is unreasonable to assume that

> a jury can disregard a co-conspirator's statement when introduced against one of two joint defendants, it does not seem at all remarkable to assume that the jury will ordinarily be able to limit its consideration to the evidence introduced during trial. At least where the anticipated, and unproduced, evidence is not touted to the jury as a crucial part of the prosecution's case, 'it is hard for us to imagine that the minds of the jurors would be so influenced by such incidental statements during this long trial that they would not appraise the evidence objectively and dispassionately'" (394 U.S. at 736).

In the instant case, the Assistant United States Attorney's opening statement emphasized a conspiracy to print large quantities of counterfeit money. Sandwiched within the recitation of facts to be proved was a brief discussion of Count Five, and a statement that the facts thereof would be substantiated by Philip Stein, who would testify to obtaining counterfeit money from the appellant. Philip Stein was never called to testify, however, and Count Five was dismissed during trial upon the Government's motion. Judge Coffrin clearly avoided any prejudice to the appellant by including in his charge the following limiting instruction:

> Count Five in the Indictment has been dismissed by the Government. This offense charged in the Indictment is no longer for your consideration. You should disregard any evidence in the case bearing solely on this offense, as well as any statements made by the Assistant United States Attorney in his Opening Statement, and also any statement which may have been made by the Court which might pertain to this particular Count alone. Count Five, if you will recall, is similar to Count Two, and just charged a different date, and a different quantity of notes. The date alleged was January 1, 1972 [sic]. Anything having to do with that particular phase of this mat-

> ter should be disregarded by you. Your verdict should not be influenced by the fact that the defendant was Indicted for this offense by the Grand Jury (R. 528, 9).

This limiting instruction was more comprehensive than the very general one given by the trial court in *Frazier,* and was, in fact, the more specific instruction recommended by Mr. Justice Marshall. 394 U.S. 731, 735, fn. See also *United States* v. *Woodring,* 446 F.2d 733 (10th Cir. 1971) at p. 727 and *United States* v. *Wallace,* 453 F.2d 420 (8th Cir. 1972), *cert. denied,* 406 U.S. 961 (1973).

Appellant's last allegation, that he was irreparably prejudiced by Agent Coppola's testimony concerning the Count Five purchase from Stein—which was offered subject to connection but was never connected—is equally without merit. Such a failure of connection was similarly cured by the trial court's limiting instruction to disregard all evidence concerning Count Five. *United States* v. *Sperling,* 362 F. Supp. 914 (S.D.N.Y. 1973).

Finally, even if the trial court had not directed the jury to completely disregard everything having to do with the "Stein count", it cannot be said that mere identification of an additional $4,000. in counterfeit money during a trial in which approximately $125,000. in counterfeit was actually admitted in evidence was unduly prejudicial.

CONCLUSION

The judgment of conviction should be affirmed.

April 15, 1974

Respectfully submitted,

EDWARD JOHN BOYD V,
United States Attorney,
Eastern District of New York.

RAYMOND J. DEARIE,
PAUL F. CORCORAN,
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Assistant United States Attorneys,
Of Counsel.

Form No. USA-33s-6a
(Rev. 1-29-71)

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 15th day of April 1974, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, two copies of Appellee's Brief of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Albert E. Silbowitz, Esq.
89-31 161 Street
Jamaica, New York 11432

Sworn to before me this
15th day of April 1974

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1975

Evelyn Cohen
EVELYN COHEN

SIR:

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

_____, 19____

_____

United States Attorney,
Attorney for _____

To:

_____

_____

_____

Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within is a true copy of _____duly entered herein on the ____ day of _____ _____, in the office of the Clerk of the U. S. District Court for the Eastern District of New York,

Dated: Brooklyn, New York,

_____, 19____

_____

United States Attorney,
Attorney for _____

To:

_____

_____

_____

Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ _____is hereby admitted.

Dated: _____, 19____

_____

Attorney for _____

FPI-LC-5M-8-73-7355